Tan Yew Choy v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–34 OF 2008
ALAUDDIN PCA, ARIFIN ZAKARIA CJ (MALAYA) AND ZULKEFLI FCJ
8 MAY 2009

Criminal Law — Dangerous drugs — Trafficking — Presumption — Whether amount of cannabis exceeded quantity specified in s 37(da) of the Dangerous Drugs Act 1952 — Whether presumption arose against accused

Criminal Law — Dangerous drugs — Trafficking — Presumption — Whether judge addressed discrepancy of gross weight and net weight of cannabis possessed by accused — Whether prosecution proved case beyond reasonable doubt — Dangerous Drugs Act 1952 ss 12(2), 39B(1)(a), 37(d) & (da)

The appellant was detained by the police in his apartment and they found dried leaves suspected to be cannabis placed on a piece of newspaper on the floor. A foot away from the appellant a box containing 40 plastic packets containing cannabis was seized by the police. The police also found in the pocket of the appellant's trousers, a cigarette box containing nine plastic packets filled with drugs. The dried leaves were identified as cannabis weighing 224.65g by the chemist, the subject matter of the first charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The nine packets in the cigarette box were identified to contain 20.73g of methamphetamine, the subject matter of the second charge under s 12(2) of the Act. The learned trial judge invoked the presumption under s 37(d) of the Act to find that the appellant was in possession of the drugs. However, the presumption under s 37(d) was not invoked for the cannabis placed on the newspaper and the 40 plastic packets found a foot away from the appellant on the floor. The appellant was found guilty for both charges by the High Court and the conviction was upheld by the Court of Appeal. The appellant submitted that: (i) there was doubt as to the identity of the cannabis in that the net weight of 224.65g exceeded the gross weight of 205g and as such it cannot be said that the prosecution had proved the offence of trafficking beyond reasonable doubt; (ii) the learned trial judge erred in law for failure to apply the same approach in determining whether possession had been proven in respect of the cannabis and the methamphetamine; and (iii) alternatively in respect of the possession of the cannabis, the possession was passive. These three

A grounds of appeal were not raised as grounds of appeal by the appellant in the first instance or at the appellate level.

Held, allowing the appeal:

B (1) The trial judge did not err in fact and in law in not invoking the presumption under s 37(d) of the Act with regards to the cannabis placed on the newspaper and in the 40 plastic packets which were on the floor. Similarly, the trial judge was correct in fact and in law when making an affirmative finding of possession in respect of the drugs C found in the pocket of the appellant's trousers. Each of the respective charge in this case must be considered on its own facts. The amount of the cannabis exceeded the quantity specified in s 37(da) of the Act, thus attracting the presumption of trafficking. As for physical possession, the trial judge did not err in fact and in law in accepting the evidence by D the police that the cannabis were only a foot away from the appellant (see paras 9–10); *Public Prosecutor v Foo Jua Eng* [1966] 1 MLJ 197. The 'mens rea' possession was based on finding of fact which was rightly concluded by the trial judge.

E (2) When the cannabis reached the hands of the chemist the cannabis has increased in weight by 19.65g. The fact both the raiding officer and the investigating officer used the same weighing scale showed that both police officers had confidence in the accuracy of the said weighing scale. F The learned trial judge erred in law in not resolving the aspect in favour of the appellant bearing in mind that this was a borderline case where the weight of the cannabis was 224.65g and the amount was only 24.65g in excess of the amount of 200g to attract the statutory presumption of trafficking under s 37(da) of the Act. It was incumbent G upon the prosecution to prove by way of expert evidence that the weighing scale used was not calibrated, and therefore unreliable (see para 12).

(3) The appellant had shown that there was a discrepancy in that the net H weight of the cannabis as determined by the chemist exceeded the gross weight of the cannabis when it was first recovered by the police. It would therefore follow that the prosecution could not be said to have proven the offence of trafficking beyond reasonable doubt against the appellant. A reasonable doubt had been created as to whether the I cannabis that were recovered by the police that was sent to the chemist for analysis was the same substance that was found to be cannabis and it was in respect of that substance that the appellant was charged with trafficking (see para 13); *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489.

[Bahasa Malaysia summary

Perayu telah ditahan oleh polis di apartmennya dan mereka telah menjumpai daun kering yang disyaki kanabis yang telah diletakkan atas sekeping surat khabar di atas lantai. Sejauh satu kaki daripada perayu sebuah kotak mengandungi 40 bungkusan plastik yang mengandungi kanabis telah dirampas oleh polis. Polis juga menjumpai dalam poket seluar perayu, sekotak rokok mengandungi sembilan paket plastik yang berisi dadah. Daun kering tersebut dikenal pasti oleh ahli kimia sebagai kanabis seberat 224.65g yang merupakan perkara subjek pertuduhan pertama di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Kesembilan paket dalam kotak rokok itu dikenal pasti mengandungi 20.73g methamphetamine yang merupakan perkara subjek pertuduhan kedua di bawah s 12(2) Akta tersebut. Hakim perbicaraan yang bijaksana telah menggunakan anggapan di bawah s 37(d) Akta tersebut untuk mendapati bahawa perayu memiliki dadah. Walau bagaimanapun, anggapan di bawah s 37(d) tidak digunakan kerana kanabis tersebut diletakkan di atas surat khabar dan 40 paket plastik dijumpai satu kaki daripada perayu di atas lantai. Perayu didapati bersalah atas kedua-dua pertuduhan oleh Mahkamah Tinggi dan sabitan dikekalkan oleh Mahkamah Rayuan. Perayu berhujah bahawa: (i) terdapat keraguan berhubung identiti kanabis kerana berat bersih 224.65g melebihi berat kasar 205g dan oleh itu tidak boleh dikatakan bahawa pendakwaan telah membuktikan kesalahan pengedaran melampaui keraguan munasabah; (ii) hakim perbicaraan yang bijaksana terkhilaf dari segi undang-undang kerana gagal menggunakan pendekatan sama untuk menentukan sama ada milikan dibuktikan berkaitan kanabis dan methamphetamine tersebut; dan (iii) secara alternatif berkaitan milikan kanabis, milikan itu adalah pasif. Alasan-alasan rayuan berikut tidak ditimbulkan sebagai alasan-alasan rayuan oleh perayu pada mulanya atau di peringkat rayuan.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan tidak terkhilaf dari segi fakta dan undang-undang kerana tidak menggunakan anggapan di bawah s 37(d) Akta tersebut berhubung kanabis yang diletakkan atas surat khabar dan berhubung 40 paket plastik yang berada di atas lantai. Begitu juga, hakim perbicaraan adalah betul dari segi fakta dan undang-undang apabila membuat penemuan mengiakan milikan berkaitan dadah yang dijumpai dalam poket seluar perayu. Setiap pertuduhan tersebut dalam kes ini hendaklah dipertimbangkan berdasarkan faktanya sendiri. Jumlah kanabis itu melebihi kuantiti yang ditetapkan dalam s 37(da) Akta tersebut, dengan itu mengundang anggapan pengedaran. Berhubung milikan secara fizikal, hakim perbicaraan tidak terkhilaf dari segi fakta dan undang-undang apabila menerima keterangan oleh polis bahawa kanabis itu hanya dijumpai satu kaki daripada perayu. 'Mens rea' milikan adalah berdasarkan penemuan fakta yang telah

A dipertimbangkan sewajarnya oleh hakim perbicaraan (lihat perenggan 9–10); *Public Prosecutor v Foo Jua Eng* [1966] 1 MLJ 197 dirujuk.

(2) Apabila kanabis itu tiba ke tangan ahli kimia kanabis itu telah bertambah beratnya sebanyak 19.65g. Hakikat bahawa kedua-dua pegawai serbuan dan pegawai penyiasat telah menggunakan alat timbang yang sama menunjukkan bahawa kedua-dua pegawai polis tersebut mempunyai keyakinan dengan ketepatan alat timbang tersebut. Hakim perbicaraan yang bijaksana terkhilaf dari segi undang-undang kerana tidak dapat menyelesaikan aspek tersebut bagi menyebelahi pihak perayu dengan mengambilkira bahawa ini merupakan kes atas sempadan di mana berat kanabis adalah 224.65g dan jumlahnya hanya 24.65g melebihi jumlah 200g itu untuk membawa kepada anggapan statutori pengedaran di bawah s 37(da) Akta tersebut. Pendakwaan wajib membuktikan melalui keterangan pakar bahawa alat timbang tersebut yang digunakan tidak menentukur, dan oleh itu tidak boleh dipercayai (lihat perenggan 12).

(3) Perayu telah menunjukkan bahawa terdapat percanggahan di mana berat bersih kanabis itu sepertimana yang ditentukan oleh ahli kimia adalah melebihi berat kasar kanabis ketika ia pertama kali dijumpai oleh polis. Oleh demikian pendakwaan tidak boleh dikatakan telah membuktikan kesalahan pengedaran melampaui keraguan munasabah terhadap perayu. Satu keraguan munasabah telah terbentuk berhubung sama ada kanabis yang dijumpai oleh polis yang telah dihantar kepada ahli kimia untuk dianalisis adalah bahan yang sama yang didapati adalah kanabis dan adalah berkaitan bahan tersebutlah perayu telah dituduh kerana mengedar (lihat perenggan 13); *Gunalan a/l Ramachandran & Ors v PP* [2004] 4 MLJ 489 dirujuk.]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
PP v Foo Jua Eng [1966] 1 MLJ 197, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 37(d), (da)

Appeal from: Criminal Appeal No W-05–50 of 2002 (Court of Appeal, Putrajaya)

Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellant.

Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zulkefli FCJ (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged in the High Court at Kuala Lumpur on the following two charges under the Dangerous Drugs Act 1952 ('the Act'):

First Charge

> Bahawa kamu, pada 10 Januari 2001, jam lebih kurang 1.00 tengahari, di rumah nombor 3–1–15, Green View Apartment, Jalan 8/40, Taman Pusat Kepong, Kuala Lumpur, Wilayah Persekutuan, telah mengedar dadah berbahaya, iaitu 224.65 gram cannabis, oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Second Charge

> Bahawa kamu, pada 10 Januari 2001, jam lebih kurang 1.00 tengahari, di rumah nombor 3–1–15, Green View Apartment, Jalan 8/40, Taman Pusat Kepong, Kuala Lumpur, Wilayah Persekutuan, telah memiliki dadah berbahaya iaitu 20.73 gram methamphetamine, oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya dan boleh dihukum di bawah seksyen 39A(1) Akta yang sama.

[2] The appellant was found guilty by the High Court in respect of both the charges. He was sentenced to death on the charge of trafficking of cannabis under the first charge and was sentenced to three years imprisonment on the charge of being in possession of methamphetamine under the second charge. The appellant appealed to the Court of Appeal against the decision of the High Court. The learned judges of the Court of Appeal dismissed the appellant's appeal in respect of both the charges. The appellant now appeals to this court against the decision of the Court of Appeal affirming his conviction and sentence with regard to the trafficking charge.

THE CASE FOR THE PROSECUTION

[3] The relevant facts of the case for the prosecution are as follows.

A **[4]** On 10 January 2001 PW7 (ASP Mohd Rafique) and a team of three other police officers raided an apartment at No 3–1–15, Green View Apartment, Jalan 8/40, Taman Pusat, Kepong, Kuala Lumpur. When PW7 gained access into the said apartment he saw the appellant seated on the floor of the rear room. PW7 said that he saw the appellant was then rolling dried
B leaves suspected to be cannabis.

[5] The dried leaves were placed on a newspaper on the floor (exh P6A). About one foot away from the appellant was a box (exh P8). Inside the box were 40 plastic packets containing dried leaves suspected to be cannabis.
C From the trouser's pocket of the appellant, PW7 found a Dunhill cigarette box (exh P7A). Inside it were five plastic packets (exh P7B(1–5)) of syabu and four plastic packets (exh P7B(6–9)) containing 97 pills suspected to be ecstasy. The dried leaves were confirmed by the chemist to weigh 224.65g of cannabis, the subject matter of the first charge. The contents of the nine
D plastic packets in the cigarette box were found to contain 20.73g of methamphetamine, the subject matter of the second charge.

THE APPEAL

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[6] Before this court the appellant advanced three grounds of appeal as follows:

(a) there is doubt as to the identity of the cannabis in that the nett weight exceeded the gross weight and as such it cannot be said that the
F prosecution has proved the offence of trafficking beyond reasonable doubt;

(b) the learned trial judge erred in law in that he did not apply the same approach in determining whether possession had been proven in respect of the cannabis and the methamphetamine; and
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(c) alternatively, in respect of the cannabis, even if there was possession, possession was passive.

[7] We noted that the above three grounds of appeal were not raised as
H grounds of appeal of the appellant before the Court of Appeal and issues relating to them were not canvassed at all before the Court of Appeal. Learned counsel for the appellant confirmed this fact. On this point we take the view that in criminal proceedings, whether at the hearing at first instance or at the appellate level, the appellant, as the accused person, is at liberty to
I raise any questions or issues which relate to the question whether or not the prosecution has proven its case beyond all reasonable doubt as required by law.

[8] We shall first deal with the second and the third grounds of appeal of the appellant. With regard to the drugs (methamphetamine) found in the trouser's pocket of the appellant, the learned trial judge invoked the presumption under s 37(d) of the Act to find that the appellant was in possession of the said drugs. However with regard to the cannabis placed on the newspaper and in the 40 plastic packets, which were on the floor, the learned trial judge did not invoke the presumption under s 37(d) of the Act. Learned counsel for the appellant submitted that there cannot be different standards applied to the two sets of offending exhibits in this case. He posed two questions as to firstly, why the presumption under s 37(d) of the Act was not be invoked in respect of the cannabis and secondly, why an affirmative finding of possession was not made in respect of the drugs in the pocket. It is the contention of the appellant that the approach undertaken by the learned trial judge was in error and had prejudiced the appellant. The approach taken by the learned trial judge had put the appellant at a disadvantage. To the appellant the trial court had clearly misdirected itself in that it failed to give the appellant the benefit of the doubt and drew an inference favourable to him.

[9] With respect to the above contention of learned counsel for the appellant, we do not agree with him. We are of the view, that on the basis that there is no dispute as to the identity of the offending exhibits, the learned trial judge did not err in fact and in law in not invoking the presumption under s 37(d) of the Act with regard to the cannabis placed on the newspaper and in the 40 plastic packets which were on the floor. We also find that the learned trial judge did not err in fact and in law in not making an affirmative finding of possession in respect of the drugs found in the trouser's packet of the appellant. It is to be noted in this case that one of the two offending exhibits, that is the methamphetamine was not found together at the same place as the cannabis which was found on the floor of the rear room. Furthermore the appellant was charged with two separate offences under the Act in respect of the said two offending exhibits. Based on the facts and the circumstances of the case, we are of the view that the learned trial judge did not misdirect himself in making such a finding in respect of the two offending exhibits. We would state here that each of the respective charge in this case must be considered on its own facts.

[10] In relation to the cannabis charge which the prosecution relied on s 37(da) of the Act, we find that the learned trial judge was justified in making a factual finding of possession as understood in criminal law, based on the evidence before the court (see the case of *Muhammed bin Hassan v*

Public Prosecutor [1998] 2 MLJ 273). In the present case the amount of dangerous drugs (the cannabis) exceeded the quantity specified in s 37(da) of the Act thereby attracting the presumption of trafficking. As for physical possession, the learned trial judge accepted the evidence of PW7 that the proscribed drug was only a foot away from the appellant. On this point in the case of *Public Prosecutor v Foo Jua Eng* [1966] 1 MLJ 197 where the accused was found by the police who raided the premises to be seated in close proximity to the offending exhibit, it was held that such close proximity was sufficient to find a case to answer. As for 'mens rea' possession the learned trial judge concluded that the appellant knew the nature of the drug. This is a finding of fact. This court will not differ from the view formed by the learned trial judge upon such an issue. In relation to the drugs (methamphetamine) found in the trouser's pocket of the appellant, it is to be noted that the said drugs were found to have been placed inside a cigarette box. The learned trial judge was therefore justified in invoking the presumption under s 37(d) of the Act to find that the appellant was in possession of the said drugs.

[11] We shall now deal with the first ground of appeal. We find there is merit in the arguments advanced by learned counsel for the appellant. We agree with the contention of the appellant that there is a serious doubt as to the weight of the cannabis, thus affecting the identity of the cannabis. According to the chemist ('PW3') the total weight of the cannabis is 224.65g. The weight of 224.65g is obtained by adding the weight of the cannabis placed on the newspaper which is 151.08g and the cannabis from the 40 plastic packets which is 73.57g. However, exh P15 (borang serah-menyerah) stated that the weight of the cannabis to be 140g (on the newspaper) and 65g (in the 40 packets) making the total gross weight to be 205g. This would mean that by the time the cannabis reached the hands of the chemist the cannabis has increased in weight by 19.65g. PW7, the raiding officer in his evidence confirmed that he weighed the cannabis and found the weight to be 140g and 65g, making a total of 205g. PW6 (the investigating officer) also confirmed that he weighed the cannabis and that the weight obtained by him was 205g. Both PW6 and PW7 used the same weighing scale (exh P17) seized from the appellant's apartment. With regard to the discrepancy in the weight, the only explanation that PW7 gave was, inter alia, as follows:

> Perbezaan dalam berat kasar mungkin kerana alat timbang yang tidak ikut kalibirasinya (see p 104 of the appeal record).

[12] We are of the view that the above purported explanation given by PW7 cannot be accepted. It is merely speculative for PW7 to say that the

weighing scale might not be accurate. It could very well be that the weighing scale was accurate and that probability cannot be brushed aside. The fact that both PW7 and PW6 used the same weighing scale showed that both the police officers had confidence in the accuracy of the said weighing scale. It is our judgment that the learned trial judge erred in law in not resolving this aspect in favour of the appellant bearing in mind that this is a borderline case where the weight of the cannabis is 224.65g and that amount is only 24.65 in excess of the amount of 200g to attract the statutory presumption of trafficking under s 37(da) of the Act. We noted the learned trial judge's response to this discrepancy was that it is not always the case that the weight obtained by the chemist would be less than the weight obtained by the police. The learned trial judge also said that exh P17 was not calibrated and what is important is the nett weight as stated by the chemist. With respect we find the reasonings given by the learned trial judge are not tenable in the circumstances of the case. The reasons advanced by the learned trial judge are based merely on general statement and not based on evidence. No question was put to the appellant that exh P17 had not been calibrated and therefore inaccurate. In fact it is our view that it is incumbent upon the prosecution to prove by way of expert evidence that exh P17 was not calibrated, and therefore unreliable.

[13] We are of the view that if we were to accept the reasons given by the learned trial judge as representing the correct law it means that the identity of the exhibit when it is first recovered is immaterial as ultimately what is important is the weight as determined by the chemist. With respect, this is not the law. In the present case the appellant has shown there is a discrepancy in that the nett weight of the cannabis as determined by the chemist exceeded the gross weight of the cannabis when they were first recovered by the police. It would therefore follow that the prosecution cannot be said to have proven the offence of trafficking beyond reasonable doubt against the appellant. A reasonable doubt has been created as to whether the cannabis that was recovered by the police that was sent to the chemist for analysis is the same substance that is found to be cannabis and it is in respect of that substance that the appellant is charged with trafficking (see the case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551). On this ground alone the appellant would succeed in his appeal.

CONCLUSION

[14] For the reasons above stated we would allow this appeal. The

A conviction and sentence recorded by the learned trial judge in respect of the first charge is hereby set aside. The appellant is accordingly acquitted and discharged in respect of the charge of trafficking.

Appeal allowed.

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Reported by Mashrifah Ravendran

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